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Nos. 93-356, 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS, INC.,
Petitioner,
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONERS

IBM respectfully submits this brief in support of petitioners United States and Federal Communications Commission and MCI Telecommunications Corporation.[1]

[1] IBM files this brief with the consent of all the parties. Letters consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICUS CURIAE

IBM is a manufacturer of equipment used with telecommunications services and is a substantial user of such services. In both capacities, IBM has a significant interest in the maintenance of a competitive marketplace for telecommunications services. This case involves a policy of the Federal Communications Commission ("Commission") under section 203(b)(2) of the Communications Act of 1934 ("Act"), as amended, 47 U.S.C. § 203(b)(2), to permit "nondominant" carriers not to file tariffs for their interstate services while remaining subject to other regulatory requirements under the Act. The Commission has found this "forbearance" or "permissive detariffing" policy to be an effective means of promoting competition in telecommunications services and thereby achieving the goals of the Act. IBM has structured its business dealings and made investment decisions in reliance on the Commission's policy, on the assumption that the marketplace for telecommunications services would remain competitive and, indeed, become increasingly competitive. IBM participated in the Commission's rulemaking proceeding that led to its decision reaffirming the forbearance policy and to the case at bar. The ruling of the court below would invalidate the Commission's decision.

STATEMENT

This statement sets forth briefly the historical context of the Commission's permissive detariffing policy at issue here. The question in this case is whether the Commission has flexibility to tailor its federal tariff regulation to achieve the core goal of the Act: "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The court of appeals held that the Commission *must* require all common carriers subject to its jurisdiction under Title II of the Act to file the rates, terms, and conditions of all their interstate services with the Commission.

We address in the Argument whether the statute must be read to impose such a requirement. Here we demonstrate that the Commission has never in the 60-year history of the Act implemented the statute in that fashion. To the contrary, the Commission has often and in varied contexts concluded that it can best fulfill its statutory mandate by forbearing from requiring the filing of tariffs for some of the services that fall within the scope of its jurisdiction under the Act. Long before its forbearance decisions with respect to nondominant carriers and, indeed, before competition emerged in telecommunications equipment and services, the Commission exempted interstate facilities and services from federal tariffing where it found such regulation to be unnecessary or counterproductive to the attainment and maintenance of an "efficient Nation-wide and worldwide . . . communication service." 47 U.S.C. § 151.

The starting point for the Commission's approach in this regard is the vast scope of its jurisdiction over communications services. The Act grants the Commission jurisdiction over "all interstate . . . communication by wire or radio." 47 U.S.C. § 152(a). As defined in the Act, "communication by wire or radio" extends from the point of origin to the point of reception, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), (b). Any common carrier that provides such communication on an interstate basis is subject to the Commission's jurisdiction under Title II, 47 U.S.C. §§ 201-226, and, therefore to the tariff requirement of section 203, 47 U.S.C. §203.

Because the telecommunications marketplace is increasingly national (and worldwide) in scope, the vast majority of communications services have some interstate aspect. The local telephone exchanges that carry calls within a community are used also to originate and terminate calls

that go across the country or around the world. Accordingly, even local telephone service is recognized to perform an interstate function -- that of providing "exchange access" for calls to or from another state or country. The courts have recognized that this "local exchange portion of interstate services" is subject to Commission jurisdiction under Title II, even though the facilities to provide it may be in a single state.[2] Thus, although Congress in section 2(b) of the Act preserved state authority over purely intrastate communications,[3] the great bulk of communications services have some interstate aspect that brings them within the Commission's Title II jurisdiction. As the D.C. Circuit has observed, "[e]very court that has considered this matter . . . has held that the physically intrastate location of the service does not preclude Commission jurisdiction so long as the service is used for the completion of interstate communications." *National Association of Regulatory Utility Commissioners*, 746 F.2d at 1499. Indeed, "purely intrastate facilities and services used to complete even a single interstate call may become subject to Commission regulation to the extent of their interstate use." *Id.* at 1498.

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[2] *New York Tel. Co.*, 76 F.C.C.2d 349, 352 (1980), *aff'd sub nom. New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980). The Commission's jurisdiction extends to all facilities and services used to originate, transport, or terminate interstate communications. *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1050 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Eastex Tel. Coop., Inc.*, 45 F.C.C. 2d 464, 468-70 (1974); *Jordaphone Corp. of America v. AT&T*, 18 F.C.C. 644, 670 (1954).

[3] "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. § 152(b); *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

Thus, if the Commission had the desire (and resources) to do so, it could have required the filing of federal tariffs not only for all facilities and services that cross state borders but also for all local exchange networks, services, and carrier-provided terminal equipment used even for isolated interstate calls.[4] But the Commission wisely has never exercised the full scope of its authority. Instead, it has required federal tariffing only where it concluded that such regulation was necessary to achieve the purposes of the Act. As to terminal equipment, the Commission left "[t]he vast majority" of such equipment to be "regulated by the states." *North Carolina Utilities Commission*, 552 F.2d at 1050. It did so even though consumers obviously used their telephones and other terminal equipment for interstate calls, and the Commission "never conceded that joint equipment is beyond federal jurisdiction should the need for federal action arise." *Id.*[5]

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[4] For years, the Commission and state regulatory authorities allowed carriers to include terminal equipment in their regulated communications offerings. This practice ended in the early 1980's, when the Commission determined that customer premises equipment no longer should be regulated as part of common carrier services. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 487, *recon.*, 84 F.C.C.2d 50 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[5] When the Commission subsequently deregulated customer premises equipment and "enhanced" services (services that provide something more than mere transport of information), it based that action primarily on the ground that these offerings should no longer be considered "common carrier" services. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d at 430-32. However, both the Commission and the D.C. Circuit acknowledged that the Commission's action could be based alternatively on the Commission's forbearance power, "[t]o the extent that certain enhanced services could lawfully be regulated . . . as common carrier services." *Computer and Communications Indus. Ass'n v.*

For example, in *Diamond International*, the Commission declined to require federal tariffing of PBXs (a form of terminal equipment) because,

> [g]enerally, the charges relating to PBX's and related services, even though used in connection with interstate service, are permitted to be contained in the exchange tariffs filed with the states where such facilities are also used in connection with exchange service.[6]

The D.C. Circuit upheld this decision since "[n]othing in the record [suggested] that the Commission's decision to refrain from exercising jurisdiction . . . [would] substantially affect the conduct or development of interstate communications."[7]

Similarly, in *Department of Defense v. American Telephone & Telegraph Co.*, 80 F.C.C.2d 287, 291 (1981), the Commission declined to require federal tariffing of terminal equipment used for interstate communications, noting:

> [A]lthough we recognize our jurisdiction over jointly-used terminal equipment to the extent they are used

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FCC, 693 F.2d at 209-11; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d at 434-35.

[6] *Diamond Int'l Corp. v. AT&T*, 70 F.C.C.2d 656, 659-60 (1979), *aff'd sub nom. Diamond Int'l Corp. v. FCC*, 627 F.2d 489 (D.C. Cir. 1980). In an early decision, the Commission required federal tariffing of terminal equipment furnished in connection with teletypewriter exchange ("TWX") service, declaring that "sound regulatory policy requires that charges for a service such as TWX, which is so predominantly interstate in its use, should be contained in tariffs on file with this Commission." *Am. Tel. & Tel. Co.*, 38 F.C.C. 1127, 1133 (1965). Dicta in that decision suggest a lack of forbearance power, *id.*, but those dicta do not survive the Commission's many subsequent considered exercises of such power.

[7] *Diamond Int'l Corp.*, 627 F.2d at 493.

> interstate, our practice has generally been to defer tariff authority over such equipment to the jurisdiction of the appropriate state commissions.

The Commission said that it would exercise jurisdiction "where it can be shown that federal action is necessary to protect the conduct or development of interstate communications." *Id.*

The Commission has taken the same approach with respect to *services* that are mostly local in character -- it has declined to regulate them to the full extent of its jurisdiction. Although local exchange service is used to originate and terminate interstate calls, the Commission has not required federal tariffing except in rare cases. For example, the Commission has generally declined to require federal tariffs for local exchange service used to carry interstate traffic to and from interstate foreign exchange ("FX") and Common Control Switching Arrangements ("CCSA") services. *American Telephone and Telegraph Co.*, 56 F.C.C.2d 14, 19, 21 (1975), *aff'd sub nom. California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). The Commission has asserted jurisdiction and required federal tariffing only in the exceptional case where it has found that a state tariff for FX and CCSA arrangements discriminated against interstate service.[8]

In another context, the Commission relied on policy objectives concerning the smooth implementation of its

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[8] *See New York Tel. Co.*, 76 F.C.C.2d 349. More recently, since the divestiture of AT&T's local exchange operations, the Commission has adopted a federally tariffed access charge scheme in which the costs attributable to interstate access are recovered under federal tariffs, in part from the end user and in part from the interexchange service provider. *MTS & WATS Mkt. Structure*, Third Report & Order, 93 F.C.C.2d 241, *recon.* 54 Rad. Reg. 2d (P & F) 615 (1983), *further recon.*, 97 F.C.C.2d 834, *aff'd per curiam sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d 1095 (D.C. Cir. 1984).

Open Network Architecture plan to justify forbearing from requiring federal tariffs for Complementary Network Services ("CNSs") used in connection with interstate services. CNSs are special features offered to subscribers over their local lines to facilitate their access to and use of interstate enhanced services. The Commission found that state tariffing would suffice.[9]

In the cellular telephone area as well, the Commission has asserted its jurisdiction over cellular communications, relying primarily on its authority to license or certify how many and which carriers will operate cellular systems.[10] However, it declined to exercise its authority "to assert federal primacy" over cellular communications providers. *Cellular Communications Systems*, 86 F.C.C.2d at 505. Instead, the Commission has preserved for the states an active role in certifying providers so long as the state procedures do not frustrate the Commission's "policy of introducing cellular service in a competitive environment without significant delay." *Id.* at 503. Moreover, the Commission has expressly left tariffing to the states. *Cellular Communications Systems*, 90 F.C.C.2d at 96.[11]

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[9] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd. 1 (1988), *recon.*, 5 FCC Rcd 3084, 3085 (1990) (reaffirming decision to allow state tariffing of CNSs), *aff'd sub nom. California v. FCC*, No. 93-70336 (9th Cir. Sept. 23, 1993).

[10] *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 505 (1981) ("*Cellular Communications Systems*"), *recon.* 89 F.C.C.2d 58, 94-96, *further recon.* 90 F.C.C.2d 571 (1982).

[11] In declining to exercise its full authority over cellular services, the Commission relied on an earlier decision to forbear from regulating mobile services. 86 F.C.C.2d at 503 (citing *Regulatory Policies and Procedures in the Domestic Public Land Mobile Radio Service*, First Report and Order, 69 F.C.C.2d 398 (1978)). The Commission subsequently concluded that federal interests required it to regulate mobile services more actively. *Preemption of State Entry Regulation in the*

Finally, citing "administrative and other practical concerns," the Commission has concluded that it need not regulate all physically intrastate private lines carrying interstate traffic. Although the Commission has repeatedly asserted its jurisdiction to require federal tariffs for any private line that carries any interstate calls,[12] it recently decided to defer to state regulation of lines on which the proportion of interstate traffic is 10 percent or less. *MTS and WATS Market Structure*, 4 FCC Rcd 5660, 5660-61 (1989).

The Commission's permissive detariffing policy for nondominant carriers arises against this background. Having long forborne from exercising its full jurisdiction in the interest of achieving a practical accommodation between federal and state regulators, the Commission more recently confronted a new situation in which forbearance appeared to serve the policies of the Act: The traditional monopoly in telephone service began to give way to a competitive environment with multiple service providers. In the *Competitive Carrier* proceeding, the Commission determined that, with respect to carriers that lack market power ("nondominant carriers"), it could rely in the first instance on a tool other than federal tariffs -- market forces -- "to make available . . . to all the people of the United States a

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Public Land Mobile Service, 59 Rad. Reg. 2d (P & F) 1518, 1530-1532 (1987) (preempting state entry laws or regulations prohibiting or impeding the entry of common carriers providing conventional paging services and two-way mobile services). The preemption order invokes the Commission's jurisdiction to regulate in this area, which it had previously left to the states.

[12] *AT&T and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services Used for Completion of Interstate Communications*, 94 F.C.C.2d 1110, 1114-15 (1983), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *New York Tel. Co.*, 76 F.C.C.2d at 353; *American Tel. & Tel. Co.*, 56 F.C.C.2d at 19.

rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In this area, as in the federal/state context, the Commission retained its ability to ensure compliance with the substantive provisions of the Act by adhering to the section 208, 47 U.S.C. § 208, complaint process, under which it entertains claims of violation of the Act, and by preserving the option of requiring federal tariffs if necessary.

In its *First Report and Order* in *Competitive Carrier*, 85 F.C.C.2d 1 (1980), the Commission adopted a two-tiered regulatory scheme, relaxing the tariffing requirements of section 203 as they applied to nondominant carriers. Recognizing its mandate to ensure "'efficient Nation-wide and worldwide . . . communication service,'" the Commission concluded that application of its traditional regulatory procedures to nondominant carriers imposed "unnecessary and counterproductive regulatory constraints" upon carriers who lacked the ability or incentive to set unreasonable or discriminatory prices. *Id.* at 2-4, 20-21 (citing 47 U.S.C. § 151).

In subsequent years, the Commission incrementally relieved specified classes of nondominant carriers of the obligation to file tariffs.[13] At the same time, the Commission continued to apply the remaining rate provisions of Title II, including the requirement that rates be just, reasonable, and nondiscriminatory and the section 208 complaint process.

Citing its "duty to determine that its rules promote the public interest when applied to particular carriers . . . and to refrain from imposing and to remove unnecessary regulatory burdens on carriers," the Commission ultimately

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[13] *Second Report and Order*, 91 F.C.C.2d 59 (1982) (resellers of domestic telecommunications services), *recon. denied*, 93 F.C.C.2d 54 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983) (resellers operating on domestic off-shore points).

extended permissive detariffing to virtually all remaining categories of nondominant carriers.[14] The Commission reasoned that requiring nondominant providers to file tariffs imposed unreasonable costs and delayed the introduction of services beneficial to consumers. Moreover, the Commission concluded that nondominant providers' "filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Fourth Report and Order*, 95 F.C.C.2d at 555 n.1.

Because detariffing was permissive, many nondominant common carriers chose to continue filing their rates with the Commission. In a subsequent order in the *Competitive Carrier* proceeding, the Commission made detariffing mandatory for nondominant carriers, effectively forbidding such filings. *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *vacated and remanded sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The D.C. Circuit ruled that this mandatory detariffing policy exceeded the Commission's authority to modify federal tariffing requirements under section 203(b) of the Act. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). However, it expressly refrained from deciding whether the Commission's permissive detariffing orders were valid. *Id.*

Four years after the *MCI* decision (and six years after facilities-based nondominant carriers were permissively detariffed), AT&T filed an administrative complaint against MCI challenging MCI's provision of nontariffed services to

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[14] *Fourth Report and Order*, 95 F.C.C.2d 554, 580 (1983) (nondominant facilities-based carriers; Commission found that there was no evidence that requiring tariff filings "from certain specialized common carriers to prevent them from charging unjust or unreasonable rates or making service unavailable" is necessary to achieve the purposes of the Act); *see also Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P & F) 543 (1985) (additional categories of providers).

certain large business customers. The complaint prompted the Commission to initiate a rulemaking proceeding in order to reexamine its forbearance policy. See *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992); Pet. App. B ("*Rulemaking Order*").

Reaffirming its earlier decisions, the Commission concluded in the *Rulemaking Order* that it does have power to forbear from requiring tariffs where that furthers the goals of the Act. Pet. App. B at 9a-21a. The Commission found that although section 203(a) requires "every carrier" to file tariffs for common carrier services, section 203(b)(2) in terms allows the Commission to "modify any requirement made by or under the authority of [the] section . . . by general order applicable to special circumstances or conditions." The Commission concluded that the plain language of the provision expressly "limits the Commission's modification power in one circumstance only -- the FCC 'may not' expand the 120-day . . . notice period for tariff filings prescribed in section 203(b)(1)." *Id.* at 13a. This single limitation, the Commission held, "strongly suggests that Congress did not otherwise intend to limit [its] authority, upon a proper public interest showing, to alter the requirements of section 203." *Id.* Moreover, the Commission found substantial evidence that "Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." *Id.* at 23a.

The Commission concluded that construing section 203(b)(2) to allow it to forbear from requiring tariffs advances the purposes of the Communications Act. It stressed that forbearance power enables the Commission to tailor its regulation to changing practical circumstances, while preserving its ability to ensure compliance with the substantive provisions of the Act through the complaint process and the power to reimpose tariff requirements. *Id.* at 26a-31a. Reviewing ten years of experience with permissive detariffing of nondominant carriers, the Commis-

sion found that the policy had helped to promote competition and had produced consumer benefits such as increased options "with respect to the price of services, type of services, and selection of carriers." *Id.* at 30a. The Commission affirmed its earlier conclusions that mandatory tariff regulation of nondominant carriers would inhibit "price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." *Id.* at 27a.

The court below summarily reversed the *Rulemaking Order*. It based its action on its earlier *MCI* mandatory detariffing decision and its intervening decision overturning the Commission's dismissal of MCI's complaint, *American Telephone & Telegraph Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. C. The court's summary order did not discuss the Commissions findings in the *Rulemaking Order*.

SUMMARY OF ARGUMENT

This case calls into question the Commission's authority to use forbearance as a regulatory tool in achieving its statutory mission to "make available, so far as possible . . . a rapid, efficient . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Section 203(b)(2) of the Act, 47 U.S.C. § 203(b)(2), allows the Commission to "modify any requirement made by or under the authority" of section 203, which otherwise requires carriers to file tariffs. The Commission interprets section 203(b)(2) to authorize permissive detariffing of services where that will further the goals of the Act. The court below summarily rejected that interpretation. In so doing, the court violated the rule of judicial deference enunciated in this Court's *Chevron*

decision by substituting its judgment for that of the expert agency charged with implementing the Act.[15]

Chevron states the governing principle very clearly: A reviewing court must defer to an agency's reasonable interpretation of its governing statute absent clear legislative intent to the contrary. The court must first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the statute is found to be "silent or ambiguous with respect to the specific issue, the court must then determine whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation is indeed "rational and consistent with the statute," *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), that interpretation must be upheld. *Chevron*, 467 U.S. at 842-43. Under this principle, not applied by the court below, the Commission's reasonable interpretation of section 203(b)(2) must be accepted.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF SECTION 203(b)(2) TO ALLOW PERMISSIVE DETARIFFING IS CONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291

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[15] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(1988).[16] Short of using the precise words "permissive detariffing," Congress could not have expressed its intention more clearly in giving the Commission authority to forbear from imposing tariffing requirements: The Commission may "modify any requirement" under section 203. 47 U.S.C. § 203(b)(2).[17] Construing this language literally, the Commission properly concluded that the power to "modify" includes the right to forbear from requiring tariffs for particular services or service providers.

Congress authorized the Commission to modify "any" requirement of section 203 save one: The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2). The normal inference from the existence of a specific exception to a statutory command is that there are no other exceptions.[18] That inference is buttressed here by the expansive language Congress used in conferring the modification authority. Section 203(b)(2) empowers the Commission to modify "any" requirement in the section at "its discretion."[19]

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[16] *See also Sullivan v. Everhart*, 494 U.S. 83, 89 (1990); *Crandon v. United States*, 494 U.S. 152, 158 (1989).

[17] Given that Congress enacted the substance of section 203(b)(2) some sixty years prior to the inception of permissive detariffing for nondominant carriers, 48 Stat. 1064, 1071 (1934) (current version at 47 U.S.C. § 203(b)(2)), "it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of [such] carriers." *Rulemaking Order*, Pet. App. B at 22a. Accordingly, a reviewing court must construe "the statutory language of 60 years ago in the light of drastic . . . change." *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 396 (1968).

[18] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[19] *Cf. United States v. State of Alaska*, 112 S.Ct. 1606, 1610-11 (1992) (finding broad delegation of authority in Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, prohibit-

The Commission noted in its *Rulemaking Order* that, although sections 203(a) and 203(c) speak in the language of command (every common carrier "shall" file tariffs; "no carrier . . . shall" provide services without filing tariffs), courts do not find such language controlling when confronted with "'a clearly expressed legislative intention to the contrary. . . .'" *Rulemaking Order*, Pet. App. at 13a n.48 (quoting *MCI v. FCC*, 765 F.2d at 1191). In this instance, Congress' express delegation of authority to the Commission to modify *any* requirement -- save one not at issue here -- qualifies what might otherwise have been deemed unconditional commands to the carriers. *Id.*[20]

Additional qualifying language in section 203(c) confirms that the power to "modify any requirement" under section 203(b)(2) includes the power to dispense with tariffs for particular services or service providers. Section 203(c) forbids the provision of service without a tariff, "unless otherwise provided by or under authority of [section 203(b)(2)]." 47 U.S.C. § 203(c).[21] The "unless" proviso compels the conclusion that Congress authorized the Commission to exempt services or service providers, in its discretion, from section 203(c)'s tariffing requirement. In short, the statute expressly contemplates the possibility of nontariffed services.

Section 4(i) of the Act further supports the Commission's interpretation of section 203(b)(2). *See Rulemaking Order*, Pet. App. B at 15a n.54. Dubbed the

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ing the "creation of *any* obstruction . . . *except* on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army" (emphasis added)).

[20] *See Rulemaking Order*, Pet. App. B at 14a (construing 203(b)(2)'s phrase "made by or under authority of this section" to include the entire section 203 (emphasis omitted)).

[21] *See Competitive Carrier*, 84 F.C.C.2d at 481 (construing 203(b)(2) to be the authority referenced in 203(c)).

Communications Act's "necessary and proper clause," section 4(i) empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Absent explicit statutory language negating the Commission's power to forbear, the Commission's broad authority to "make such rules" should not arbitrarily be circumscribed.[22]

The court below relied on its earlier reading of the statutory language: "To 'modify' . . . "suggests to 'alter; to change in incidental or subordinate features.'" *AT&T v. FCC*, Pet. App. C at 53a (quoting *MCI Telecommunications*, 765 F.2d at 1192 (citation omitted)). The verb "modify," however, has standard definitions far broader than the lower court's construct.[23] This Court recently concluded that "the existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation." *National R.R. Passenger v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (interpreting "required" to mean "useful or appropriate" *or* "indispensable or necessary"). The lower court here ignored the broader definitions and

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[22] In addition to reviewing this affirmative evidence of its authority to forbear, the Commission carefully distinguished the cases presented in opposition to that authority. Focusing on section 203(b)'s statutory language, the Commission particularly noted the contrast between its current permissive detariffing policy and an earlier attempt at mandatory detariffing. *Rulemaking Order*, Pet. App. B at 15a-20a.

[23] *See, e.g., Webster's Tenth New Collegiate Dictionary* 748 (1993) ("to make basic or fundamental changes in often to give a new orientation to or to serve a new end"); *Ballantine's Law Dictionary* 810 (3d ed. 1969) (to "effec[t] some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject matter to be modified"). Even the dictionary on which the court below relied defines modify first to mean "to alter," which it in turn defines as "to make a change in." *Black's Law Dictionary* 71 (5th ed. 1979).

adopted without explanation the more confining definition of "modify" rejected by the Commission. It is just such judicial fiat -- in which a court unjustifiably substitutes its own statutory interpretation for the reasonable interpretation by an agency -- that *Chevron* was meant to forestall.

The legislative history of section 203(b)(2) offers little support for the lower court's narrow reading of "modify any requirement."[24] The legislative record here is far less probative than the language of the statute expressly empowering the Commission to exempt services from tariffing.[25] In this circumstance, a reviewing court should "defer to the expertise of the agency" when the "legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal." *Rust v. Sullivan*, 111 S. Ct. 1759, 1768 (1991).

The subsequent history of the statute strongly supports the Commission's interpretation: Congress and the courts have acquiesced in the Commission's longstanding exercise of power to forbear as a means of indirect regulation. Congress amended the timing requirement of section 203 in 1990 without indicating any disapproval of the Commis-

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[24] Indeed, because we contend that the statutory language is plain in conferring forbearance authority on the Commission, we address the legislative history only to rebut respondent AT&T's argument that the legislative history of section 203 presents overwhelming evidence to the contrary. *Cf. TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978).

[25] For example, although the legislative history of section 203(b)(2) repeatedly discusses the term "modify" in the context of the *notice* requirements for rate filings, the final language of the Act included no such limiting condition. *See e.g.*, S. Rep. No. 918, 94th Cong., 2d Sess. 2, 9-13 (1976); H.R. Rep. No. 1315, 94th Cong., 2d Sess. 8-13 (1976). *Cf. State of Alaska, supra* at 112 S.Ct. at 1611 (concluding that the committee reports "contain[ed] no hint of whether the drafters sought to vest in the Secretary the apparently unbridled authority the plain language of the statute seems to suggest"). *See also Chevron*, 467 U.S. at 862 (finding "the legislative history as a whole" to be "silent on the *precise issue*" before the [Court]") (emphasis added).

sion's reading of that section to allow forbearance -- a reading that was brought to Congress' attention.[26] The legislature's decision to leave standing an agency's interpretation of its governing statute is "significant" insofar as the "'failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)). Contemporaneous with amending section 203(b)(2), Congress adopted amendments to Title II of the Act that are not only consistent with -- but premised on -- the existence of the Commission's power to forbear from requiring tariffs under section 203.[27]

II. THE COMMISSION'S DETERMINATION THAT IT HAS POWER TO FORBEAR FROM REQUIRING TARIFFS IS BOTH RATIONAL AND CONSISTENT WITH THE ACT.

The Commission's assertion of power to forbear not only is consistent with the accepted meaning of the term "modify," but fully "rational and consistent" with the Act. *Chevron*, 467 U.S. at 845. The Commission's *Rulemaking Order* carefully elaborates the "rationale and factual basis" underlying the agency's chosen means of regulation. *See Bowen v. American Hospital Assn.*, 476 U.S. 610, 626

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[26] *See* Pub.L. 101-396, § 7(b), 104 Stat. 848, 850 (1990) (amending section 203(b)(2)'s timing requirement); *FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House. Committee on Energy and Commerce*, 101st Cong., 1st Sess. 30 (1990) (noting the distinction between dominant and nondominant carriers).

[27] *See* Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. §226(h) (Supp. III 1991) (requiring certain nondominant carriers, with respect to which the FCC has forborne from requiring tariffs under section 203, to file informational tariffs).

(1986). That rationale was never considered by the court below.

Congress established the Commission "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To enable the Commission to achieve this broad mandate, Congress gave the agency flexible tools to "regulat[e] a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). Congress wanted to ensure that the Commission possessed "sufficient flexibility to adjust itself to [the industry's] rapidly fluctuating factors," *FCC v. Pottsville*, 309 U.S. 134, 138 (1940), and thereby "avoid the necessity of repetitive legislation." *Wold Communications, Inc. v. Commission*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (quoting *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d at 213).

As we have shown, the Commission has used this flexibility to achieve a workable sharing of regulatory responsibility between it and state agencies. The increasingly integrated telecommunications marketplace gives virtually every telecommunications service some interstate aspect. Mindful of Congress' decision, expressed in section 2(b) of the Act, to preserve state jurisdiction over purely intrastate communications, the Commission has used its forbearance power to leave tariffing at the state level in situations where there is an interstate component of the communications, but federal tariffing is unnecessary to achieve the purposes of the Act. In instance after instance throughout the history of the Act, the Commission has forborne from exercising jurisdiction under section 203 even though a service has interstate aspects that bring it within Title II of the Act. A ruling that every communications service that falls within Title II *must* be tariffed at the federal level, even where the Commission finds that federal tariffing is

unnecessary to achieve the goals of the Act, would destroy the basis for the Commission's longstanding accommodation of state regulatory interests. It would effect a massive transfer of regulatory activity from the state to the federal level, without promoting any purpose discernible in the Act.

The Commission's assertion of power to forbear is equally rational in the context of permissive detariffing of nondominant carriers. The Commission, in its *Rulemaking Order*, found that permissive detariffing has played a key role in helping to transform the previously monolithic telephone network into a system of competitive networks, in which multiple service providers vie with one another, without the impediment of tariff regulation, to meet the changing needs of users at prices constrained by competition. *Rulemaking Order*, Pet. App. B at 29a-30a.[28] More than 400 carriers offer facilities-based distance services, in competition with additional hundreds of resellers. All these interstate carriers but AT&T have been declared nondominant and thus are free under the forbearance policy to tailor their offerings to the needs of individual users. The Commission has found that this freedom produces significant consumer benefits. In particular, the Commission found that the new telecommunications services elicit-

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[28] Permissive detariffing thus furthers the statutory goal of ensuring that rates remain "just and reasonable." 47 U.S.C. § 201(b). The Commission has found that the competitive forces unleased by the forbearance policy have driven the rates for interstate telecommunications services steadily downward. *See Expanded Interconnection with Local Tel. Co. Facilities*, 7 FCC Rcd 7369, 7378 (1992), *recon.*, FCC 93-378 (released Sept. 2, 1993). Courts have recognized in other contexts that the Commission may rely on an active and competitive marketplace as a substitute for direct regulation. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) (market forces will adequately produce diversity in entertainment programming); *Wold Communication, Inc. v. FCC*, 735 F.2d at 1475 (market circumstances for satellite transponder service obviate direct regulation).

ed by competition have enabled U.S. business users to enhance their competitiveness by implementing advanced management practices, such as "just-in-time" inventory control and distributed information sharing. Permissive detariffing thus contributes to the efficiency of the many U.S. industries that rely heavily on telecommunications. *Id.*

By contrast, the Commission found that mandatory tariffing in a competitive marketplace would impede, rather than promote, competition. It found that requiring competitive sellers to file tariffs would make it more difficult for the sellers to offer new services or to give price concessions in response to market forces.[29] (The Commission had previously found that most regulatory challenges to the tariffs of nondominant carriers were brought by competitors, not by consumers.[30]) Requiring the many small carriers and resellers to file tariffs would impose inordinate cost burdens and discourage entry.[31] The Commission concluded that requiring nondominant carriers to file tariffs, far from helping consumers, would facilitate collusive pricing by the carriers.[32]

Under *Chevron*, these conclusions are entitled to judicial deference. The Commission's interpretation of section 203(b)(2) "represents a reasonable accommodation of mani-

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[29] *See Rulemaking Order*, Pet. App. B at 27a (*citing Competitive Carrier Second Report*, 91 F.C.C.2d at 62).

[30] *Competitive Carrier Notice*, 77 F.C.C.2d 308, 314 (1979).

[31] *See Rulemaking Order*, Pet. App. B at 27a (*citing Competitive Carrier Second Report*, 91 F.C.C. 2d at 65).

[32] *See id.* (citing *Competitive Carrier Fourth Report*, 95 F.C.C.2d at 556). This Court has similarly found that the advance publication of prices in a fledgling market "tends toward price uniformity" and competitive stagnation. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

festly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron*, 467 U.S. at 865 (citations omitted).[33] Far from irrelevant to the statutory inquiry, as the court below evidently thought they were, the Commission's findings confirm the reasonableness of its interpretation of its organic statute. There was no room under *Chevron* for the court below to ignore the Commission's findings and substitute its own interpretation of the Act for the reasonable interpretation by the agency.

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[33] *See also Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (stating that resolving ambiguous statutory text "is often more a question of policy than law") (citing *Chevron*, 467 U.S. at 866; Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2085-88 (1990)).

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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